IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD C. PETERSON	**:**	**CIVIL ACTION**
vs.	**:**	
EDWARD BRENNAN, Mr.; WARDEN; and, THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; and, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA	**:**	**NO. 97-3477**

MEMORANDUM

DUBOIS, J. **AUGUST 11, 1998**

Before the Court is Edward C. Peterson's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 in which he alleges various constitutional violations in both the guilt and appeal phases of his murder trial. Because the Petition contains both exhausted and unexhausted claims - is a "mixed" petition - the Court concludes that it must be dismissed for failure to exhaust state remedies. See Rose v. Lundy, 455 U.S. 509, 521-22 (1982). In order to eliminate any risk that petitioner will be barred from re-filing a habeas petition in federal court after exhausting his state remedies, the Court will dismiss the Petition without prejudice to petitioner's right to file an amended petition pursuant to Federal Rule of Civil Procedure 15(c)(2) upon exhaustion of state remedies.

I. BACKGROUND[1]

On March 10, 1988, following a jury trial before the Honorable George J. Ivins, petitioner and an accomplice, Hubert Leitner, were convicted in the Court of Common Pleas of Philadelphia County, Pennsylvania, of two counts of first degree murder for the execution-style shootings of Mario Papini and his girlfriend, Katherine Logan. Post-trial motions were denied and petitioner was sentenced to life imprisonment for each of the murder convictions.

Petitioner sought pre-trial habeas corpus relief in this Court. That petition was dismissed by the Honorable John B. Hannum, on October 2, 1987, for failure to exhaust state remedies. The dismissal was affirmed by the Third Circuit on February 29, 1988. During the pendency of post-trial motions in state court, petitioner filed a second Petition for Writ of Habeas Corpus in this Court. That petition was dismissed by Order dated October 18, 1990 for failure to exhaust state remedies.[2] Petitioner's appeal to the Third Circuit was dismissed for lack of appellate jurisdiction.

Petitioner filed two direct appeals to the Pennsylvania Superior Court. That court quashed the first appeal on the ground that petitioner's pro se brief precluded effective appellate review. Petitioner's second appeal was from a trial court order which denied his petition to compel production of certain evidence. The second appeal was quashed by Order dated January 17, 1991. While these appeals were pending in the Superior Court, petitioner filed various pro se

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[1] The background information is derived from a review of the Petition for Writ of Habeas Corpus, the Response of the Philadelphia County District Attorney's Office, petitioner's Reply to the Response, and related papers.

[2] Petitioner thereafter filed a motion to withdraw the petition without prejudice, which was granted by the Court on December 21, 1990.

motions in the Court of Common Pleas. On June 4, 1990, the Honorable William J. Manifredi of the Court of Common Pleas denied these motions, without prejudice, for lack of jurisdiction to entertain them while petitioner's case was on appeal.[3] On October 17, 1991, the Pennsylvania Supreme Court denied a petition for allowance of appeal from the Superior Court's decision to quash petitioner's direct appeals.

After these direct appeals, on May 26, 1992, petitioner filed a pro se petition under the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541, et seq. An amended petition was filed by appointed counsel, alleging, inter alia, that trial counsel was ineffective because he did not present reputation evidence. On September 29, 1993, the Honorable Joseph I. Papalini granted petitioner the opportunity to file a nunc pro tunc direct appeal to the Superior Court on the claim that trial counsel failed to call character witnesses.

On the direct appeal to the Pennsylvania Superior Court which followed, petitioner claimed, inter alia, that trial counsel was ineffective for (1) failing to present character evidence and that post-trial counsel was ineffective for failing to raise this issue; (2) failing to properly litigate a motion to dismiss for pre-arrest delay; and (3) failing to move for pre-trial dismissal under Pennsylvania Rule of Criminal Procedure 1100, the Pennsylvania speedy trial rule. The judgments of sentence were affirmed by the Superior Court on September 22, 1995. On May 22, 1996, the Pennsylvania Supreme Court denied a petition for allowance of appeal.

The instant Habeas Corpus Petition was filed on May 19, 1997, raising claims that trial counsel was ineffective in not seeking a pre-trial dismissal for denial of a speedy trial under

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[3] Petitioner filed a Motion for Reconsideration of the Order of June 4, 1990; the Motion for Reconsideration was denied on June 25, 1990. A subsequent appeal to the Superior Court was quashed on January 17, 1991, as an improper appeal from an interlocutory order.

Pennsylvania Rule of Criminal Procedure 1100, the Sixth Amendment, and the Interstate Agreement on Detainers Act ("IADA"), 42 Pa.C.S.A. § 9101, et. seq. (West. Supp. 1998), and in not properly litigating a motion to dismiss for pre-arrest delay. Petitioner also claims that the Commonwealth (1) denied him a speedy trial under the Sixth Amendment, and the IADA; (2) denied him Due Process by delaying his arrest; (3) violated his speedy trial right under the Sixth Amendment by delaying his appeal; and (4) denied him equal protection when the Superior Court concluded that his reputation evidence was irrelevant.

On March 30, 1998, Magistrate Judge Charles B. Smith, the judge to whom this Habeas Corpus Petition had been referred, recommended that the Petition be denied and dismissed without an evidentiary hearing. Judge Smith concluded that the petitioner's Sixth Amendment and IADA speedy trial claims, his Sixth Amendment delayed appeal claim, and his equal protection claim had been procedurally defaulted and, therefore, they could not serve as the basis of federal habeas review. Judge Smith then addressed the exhausted claims and recommended that petitioner's ineffective assistance of counsel claims -- in (a) not seeking pre-trial dismissal for denial of a speedy trial under Pennsylvania Rule of Criminal Procedure 1100, (b) not properly litigating a motion to dismiss for pre-arrest delay, and (c) failing to call a reputation witness -- be denied. In addition, Judge Smith recommended that petitioner's exhausted claim that post-verdict counsel was ineffective for not challenging trial counsel's ineffectiveness be denied.

The petitioner filed Objections to the Magistrate Judge's Report and Recommendation on April 24, 1998. In those Objections, petitioner disputes nearly all of the Magistrate Judge's Report and Recommendation including, inter alia: (1) the Report's finding that the petitioner was formally sentenced; (2) the Report's conclusion that petitioner's Sixth Amendment and

IADA speedy trial claims are procedurally defaulted; and (3) the Report's recommendation that the Court deny and dismiss petitioner's exhausted claims without an evidentiary hearing.[4]

The District Attorney's Office filed a Response to petitioner's Objections on May 8, 1998. The petitioner then filed a Motion to Strike Certain Portions of the District Attorney's Response on May 11, 1998 and a Reply to the Response on May 18, 1998. The District Attorney's Office filed a Reply to the petitioner's Motion to Strike on June 1, 1998.

The Court concludes that petitioner's first four claims - alleging the denial of a speedy trial under the Sixth Amendment and the IADA, a Sixth Amendment violation for a delayed appeal, and the denial of equal protection by the Superior Court Judge who concluded that petitioner's reputation evidence was irrelevant - are not clearly procedurally barred from state court review. Since petitioner has failed to exhaust state court remedies with respect to these four claims, his Habeas Corpus Petition must be dismissed without prejudice under the "mixed" petition rule adopted by the Supreme Court in Rose v. Lundy, 455 U.S. 509, 522 (1982).

II. STANDARD OF REVIEW

Pursuant to 8 U.S.C. § 636(b)(1), a federal court may refer Habeas Corpus petitions to a magistrate judge for a "report as to the facts and [a] recommendation as to the order" regarding the appropriate disposition of the petition. The district court is directed to independently consider and review de novo the magistrate judge's report and recommendation. See id.

[4] Because the Court concludes below that petitioner has not exhausted all of his claims, it need not address his objections.

III. DISCUSSION

1. Exhaustion

Petitioner's Sixth Amendment and Interstate Agreement on Detainers Act Speedy Trial Claims, Sixth Amendment Delayed Appeal Claim, and Equal Protection Claim.

The Court must first consider whether petitioner has exhausted his state remedies, as required by 28 U.S.C. § 2254(b)-(c), with respect to his Sixth Amendment and IADA speedy trial claims, and his equal protection claim. A claim which has not been pursued in all available state court proceedings has not been exhausted. See, e.g., Gibson v. Scheidemantel, 805 F.2d 135, 138 (3d Cir. 1986).[5] Exhaustion "serves the interests of comity between the federal and state systems by allowing the state an initial opportunity to determine and correct any violations of a prisoner's federal rights." Id. It is, therefore, well settled that habeas petitions presenting only unexhausted claims generally may not be granted by federal courts. See, e.g., Picard v. Connor, 404 U.S. 270, 275 (1971). In addition, the Supreme Court has consistently held that a "mixed" petition, one containing both exhausted and unexhausted claims, must also be dismissed. See, e.g., Rose v. Lundy, 455 U.S. 509, 521-22 (1982); see also Coleman v. Thompson, 501 U.S. 722, 731 (1991); Castille v. Peoples, 489 U.S. 346, 349 (1989). This is often referred to as the "total

[5] In order to exhaust a claim, it must have been "fairly presented" to the state courts, meaning that the claim heard by the state courts was the "substantial equivalent" of the claim asserted in the habeas petition. See, e.g., Picard v. Connor, 404 U.S. 270, 275, 278 (1971). Otherwise, the claim will be deemed to be newly presented in the habeas petition and, therefore, unexhausted.

exhaustion" rule.[6]

An examination of the record in this case shows that petitioner has never raised in state court a Sixth Amendment or IADA speedy trial claim, or an equal protection claim against the Commonwealth. The petitioner did present a speedy trial claim to the Pennsylvania Superior and Supreme Courts on nunc pro tunc direct appeal as a state law violation under Pennsylvania Rule of Criminal Procedure 1100. However, "it is not enough that all the facts necessary to support the federal claim were before the state courts, . . . or that a somewhat similar state-law claim was made." Anderson v. Harless, 459 U.S. 4, 7, 103 S.Ct. 276, 277 (1982) (citations omitted). Because the petitioner's Sixth Amendment and IADA speedy trial claims, as opposed to the Rule 1100 claim, and his equal protection claim were not presented to the state court on direct appeal or on collateral attack in a PCRA petition, these are newly raised issues which are unexhausted.

The petitioner also argues that he was never formally sentenced, and, as a result, his appeal was unconstitutionally delayed. This, petitioner asserts, violates his Sixth Amendment right to a speedy trial. The Sixth Amendment speedy trial clause applies from the time of arrest or criminal charge until the end of the sentencing phase of prosecution, see Burkett v. Cunningham, 826 F.2d 1208, 1220 (3d Cir. 1987), and the Court finds from the record that on March 11, 1988, the trial court denied petitioner's post-trial motions and sentenced petitioner to life imprisonment.[7] Thus, since petitioner has been formally sentenced, he cannot assert a Sixth

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[6] There are exceptions to this general rule. The principal exception applies when it would be futile to return an unexhausted claim to state court because of a state procedural bar; this exception is discussed below.

[7] This time period has been determined to extend until "one final, pre-appellate determination has been made as to whether and for how long the accused should be incarcerated." Burkett v. Cunningham, 826 F.2d 1208, 1220 (3d Cir. 1987) (citing United States

Amendment speedy trial claim.

That conclusion does not end the discussion of this claim, however. The court in Burkett stated that, "[t]he Due Process Clause . . . guarantees a reasonably speedy appeal." Id. at 1221. Thus, since petitioner has been formally sentenced, his claim of delay in appeal raises a due process, not a Sixth Amendment, claim. Id. at 1221. A review of the procedural history in this case reveals that the petitioner's Sixth Amendment delayed appeal claim, more properly framed as a due process claim, was not presented to the state court on direct appeal or on collateral attack in a PCRA petition. Thus, this is a newly raised issue which is unexhausted and, unless an exception applies, the Court must dismiss it -- and the Petition -- without prejudice.

2. Futility

Where it would be "futile" to return unexhausted claims in a "mixed" petition to state court because of a state bar, a federal court may retain jurisdiction over the petition, although it generally may not reach the merits of the unexhausted claims.[8] See Toulson v. Beyer, 987 F.2d

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v. Campisi, 583 F.2d 692, 694 (3d Cir. 1978)).

[8] Under Wainwright v. Sykes, 433 U.S. 72, 87 (1977), a federal court may reach the merits of a habeas claim barred under state law, but only where a petitioner can show either: (1) a "miscarriage of justice" or (2) "cause and prejudice" for the procedural default. To demonstrate cause, a petitioner must prove "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). The ineffectiveness of counsel at trial or on direct appeal can constitute cause for a procedural default, but only if the error itself "was also constitutionally ineffective . . . ." Sistrunk v. Vaughn, 96 F.3d 666, 675 (3d Cir. 1996) (citing Murray v. Carrier, 477 U.S. at 492). Once "cause" has been demonstrated, "actual prejudice" must also be proved, requiring that petitioner show the outcome was "unreliable or fundamentally unfair" as a result of a violation of federal law. See Lockhart v. Fretwell, 506 U.S. 364, 366 (1993); see also Coleman v. Thompson, 501 U.S. 722, 750 (1991). Petitioner argues that there is a "miscarriage of justice" in this case because he can show actual innocence. However, this exception only applies if a petitioner can first show that returning to state court would be futile. In light of the Court's

984, 987 (3d Cir. 1993). A federal court may conclude that a return by a petitioner to state court would be futile when a state procedural bar "'clearly foreclose[s] state court review of the unexhausted claims,'" Doctor v. Walters, 96 F.3d 675, 681 (3d Cir. 1996) (quoting Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993)), but if there is any uncertainty as to "how a state court would resolve a procedural default issue, [a federal court] should dismiss the petition for failure to exhaust . . . ." Id. The Court will, therefore, turn to the question of whether returning petitioner's unexhausted claims to state court would be futile.[9]

In Pennsylvania, a person may collaterally challenge his or her state conviction under the amended PCRA, and petitioner has done so with respect to some of his claims. However, as to those claims which have not been exhausted, petitioner faces two procedural bars - waiver and the statute of limitations - which will have to be overcome before he may proceed in state court.

a. PCRA's Waiver Requirement

Before a state court will consider the merits of petitioner's claim, he must overcome the waiver provision of 42 Pa.C.S.A. § 9544(b), which provides that "an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during review, on appeal or in a prior state postconviction proceeding." If applied, this requirement would almost certainly

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disposition, it does not undertake a "miscarriage of justice" inquiry.

[9] In his Objections to the Magistrate Judge's Report and Recommendation, petitioner argues that the Court may reach the merits of the Sixth Amendment and IADA speedy trial claims, as well as the delayed appeal claim. Petitioner bases his argument on the contentions that the speedy trial claims were alleged in his amended PCRA petition and that his counsel refused to present his delayed appeal claim. However, as set forth earlier in the Court's Memorandum, the Court finds from the record that the petitioner has not raised these claims in state court; the only speedy trial claim asserted in state court was premised on Pennsylvania Rule of Criminal Procedure 1100. The fact that counsel refused to present a claim does not excuse the exhaustion requirement.

bar petitioner from proceeding with his unexhausted claims in state court because he had the opportunity to present his claims on direct appeal and did not do so. See, e.g., Commonwealth v. Eaddy, 614 A.2d 1203, 1207-08 (Pa. Super. Ct. 1992), appeal denied, 626 A.2d 1155 (Pa. 1993) ("[N]early all claims are waived under the PCRA since nearly all claims potentially could have been raised on direct appeal."). In the Third Circuit, however, it is well-settled that federal courts cannot conclude "that there is no chance that the Pennsylvania courts would find a miscarriage of justice sufficient to override the waiver requirements and permit review under the PCRA. Accordingly, we conclude that a return to state court would not be futile." Doctor, 96 F.3d at 683; see also Lambert v. Blackwell, 134 F.3d 506, 522 (3d Cir. 1997); Banks v. Horn, 126 F.3d 206, 214 (3d Cir. 1997). The PCRA's waiver requirements do not, therefore, present a procedural bar sufficient to allow this Court to retain jurisdiction over petitioner's exhausted claims.

b. Statute of Limitations

In addition to the waiver rule, a recent amendment to the PCRA requires that all petitions must be filed "within one year of the date the judgment becomes final . . . ." 42 Pa.C.S.A. § 9545(b)(1) (West Supp. 1997). A judgment is final, for purposes of the PCRA, "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa.C.S.A. § 9545(b)(3).

The Superior Court of Pennsylvania affirmed petitioner's convictions on September 22, 1995 and the Supreme Court of Pennsylvania denied allocatur on May 22, 1996. Petitioner had ninety days from that date (or until August 20, 1996) in which to seek certiorari from the United

States Supreme Court, and he did not do so. Thus, judgment was final on August 20, 1996. Under a provision which was enacted at the same time as the PCRA's new statute of limitations and which became effective on January 16, 1996, however, a petitioner has one year from that effective date to file his or her first petition, regardless of when judgment became final. See Penn. Gen. Ass. Act of November 17, 1995, P.L. 1118, No. 32 (Spec.Sess. No. 1), § 3(1).

The petitioner has already filed his first PCRA petition in state court. Thus, a new petition would be considered petitioner's second PCRA petition. The Court concludes, therefore, that there is a possibility that petitioner will be barred by the statute of limitations from presenting his new claims in state court. That raises the question of whether the statute of limitations makes further state proceedings futile.

The Third Circuit recently addressed, in Lambert v. Blackwell, the question of whether it would be futile for a petitioner to return to state court where she is apparently barred by the PCRA's statute of limitations. Lambert held that an otherwise barred petition might nonetheless be heard by a state court under one of the exceptions to the PCRA's statute of limitations.[10] Lambert, 134 F.3d at 523-24. The circuit court went further, however, noting that whether or not petitioner qualified under one of those exceptions:

> no Pennsylvania court has been asked to decide under what circumstances it would excuse an untimely PCRA petition . . . . Under the prior statute which did not contain a statute of limitations provision, the Pennsylvania courts were lenient in allowing collateral review after long delays, especially in situations involving

[10] The PCRA provides three exceptions to its statute of limitations: a petition is not time barred where the petition alleges, and petitioner proves either: (1) failure to raise the claim was the result of unconstitutional or unlawful interference by a government official; (2) there are new facts not previously discoverable; or (3) there is a newly announced constitutional right with retroactive application. See 42 Pa.C.S.A. § 9545(b)(1).

ineffective assistance of counsel.

Lambert, 134 F.3d at 524, n. 33. The possibility exists, therefore, that like the waiver provisions of 42 Pa.C.S.A. § 9544, the statute of limitations bar will be waived by Pennsylvania courts in some cases. There is thus a lack of certainty with respect to state application of this procedural bar. This lack of certainty requires dismissal of the Petition. See Doctor, 96 F.3d at 681.

The Court notes that a few days before Lambert was decided, the Superior Court of Pennsylvania decided Commonwealth v. Alcorn, 703 A.2d 1054 (Pa. Super. Ct. 1997). In that case, not discussed in Lambert, the Superior Court wrote that:

> It is clear from the enactment of the 1995 amendments that the General Assembly intended to change the existing law by providing that delay by itself can result in the dismissal of a petitioner's PCRA petition. As a result, though this result may appear harsh to petitioners like appellant whose second PCRA petition will almost certainly be filed more than one year from the date when their judgment of sentence becomes final, that is the result compelled by the statute.

Id. at 1057.

Alcorn is the only Pennsylvania case which has addressed the statute of limitations question to date and it suggests that the time bar may be rigidly applied. However, because it is the decision of an intermediate court, it is only instructive, not binding on this Court. In making this determination, the Court is mindful of the language of the Third Circuit which recently stated:

> In this regard we point out that federal courts should be most cautious before reaching a conclusion dependent upon an intricate analysis of state law that a claim is procedurally barred. Toulson surely made that point clear and the enactment of the AEDPA, which overall is intended to reduce federal intrusion into state criminal proceedings, reinforces the point. In questionable cases, even those not involving capital punishment, it is better that the state courts make the determination of whether a claim is procedurally barred.

Banks v. Horn, 126 F.3d 206, 213 (3d Cir. 1997). Accordingly, in light of the clear holding in Lambert and Banks, the Court will not treat the petitioner's first four claims as clearly foreclosed in state court.

Because the Court chooses not to exercise jurisdiction under 28 U.S.C. § 2254(b)(2) to deny the claims set forth in the habeas petition, and because the Court concludes that it would not be futile for petitioner to present his four unexhausted claims in state court, the Court will not address the merits of petitioner's remaining claims, which are exhausted. Rather, in accordance with comity, the Court must first give the state courts the opportunity to rule on petitioner's unexhausted claims.

IV. APPLICATION OF THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d)(1), provides that "[a] 1-year period of limitation shall apply to an application for a Writ of Habeas Corpus . . . [which] shall run from the latest of - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review . . . ." 28 U.S.C. § 2244(d)(1). However, the AEDPA also provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period limitation . . . ." Id. at § 2244(d)(2) (emphasis added). It is this provision which presents the possibility that plaintiff may be barred from review in federal court upon re-filing because the statute of limitations is tolled only with respect to "properly filed" state applications. In the only

Third Circuit decision addressing this issue to date, the circuit court held that a "properly filed" PCRA petition is one which is "permissible under state law" which means that it is "submitted according to the state's procedural requirements, such as the rules governing the time and place of filing." Lovasz v. Vaughn, C.A. No. 97-3505, 1998 WL 9512, *2 (3d Cir. 1998). That ruling raises a question as to whether a PCRA petition filed by petitioner at this time would be a "properly filed" petition.

There is a possibility that should this Court dismiss the Petition, the state court could decide that the PCRA filing either was time barred or waived and dismiss on one of those grounds. See Alcorn, 703 A.2d at 1057. If the state court so decided, petitioner will not have filed his PCRA petition according to the "state's procedural requirements." Lovasz at *2. The filing will not, therefore, have been "proper" within the terms of the AEDPA as defined by Lovasz, and the time petitioner spent in state court would not, it follows, toll the AEDPA's statute of limitations. If it takes more than a year for the state court to reach its decision, petitioner's time to file his habeas petition under the AEDPA could expire and he might arguably be barred from federal review of his claims.[11]

While the Court cannot pre-judge the likelihood of this scenario, the Court believes there is a risk that petitioner could be barred from federal court were the Court simply to dismiss his petition, even if dismissal is without prejudice. This risk is not obviated by the fact that upon re-

[11] The Court notes that the Third Circuit recently determined that the AEDPA's statute of limitations is subject to equitable tolling. See Miller v. N.J. State Dept. Of Corrections, 1998 WL 270110 (3d Cir. May 26, 1998); see also Calderon v. United States District Court for the Central District of California, 128 F.3d 1283, 1286 (9th Cir. 1997), cert. denied 118 S.Ct. 899 (1998) (holding same).

filing a habeas petition which had been dismissed without prejudice after exhausting state remedies, the re-filed petition will not be treated as a successive or subsequent petition for purposes of the AEDPA. See Christy v. Horn, 115 F.3d 201, 208 (3d Cir. 1997). Because the AEDPA's time limit applies to first petitions as well as successive petitions, the issue is not whether the re-filed petition will face the procedural hurdles of a successive petition, but whether it will relate back to the date the initial petition was filed for statute of limitations purposes.

Simply dismissing without prejudice - with nothing more - might not allow petitioner to argue that his re-filed petition relates back to the date of filing his initial federal petition. See, e.g., Cardio-Medical Associates, Ltd. V. Crozer-Chester Medical Center, 721 F.2d 68, 77 (3d Cir. 1983) ("It is a well recognized principle that a statute of limitations is not tolled by the filing of a complaint subsequently dismissed without prejudice. As regards the statute of limitations, the original complaint is treated as if it never existed.") (citing Butler v. Sinn, 423 F.2d 1116 (3d Cir. 1970) (per curiam); Di Sabatino v. Mertz, 82 F.Supp. 248 (M.D.Pa. 1949)); Sabo v. Parisi, 583 F.Supp. 1468, 1470 (E.D.Pa. 1984) (holding that where plaintiff files second complaint two years after first was dismissed without prejudice, "fact that defendants may have been on notice as to plaintiff's cause of action does not toll the running of the statute; only the refiling of the complaint within the statutory period could have done that"). Accordingly, in order to avoid potential problems with respect to the tolling of the AEDPA's statute of limitations during the pendency of the PCRA proceedings, the Court will dismiss the Petition without prejudice to petitioner's right to file an amended petition after exhaustion of state remedies. The filing of such an amended petition would, pursuant to Federal Rule of Civil Procedure 15(c)(2), relate back to the original filing date of the habeas corpus petition because "the claim . . . asserted in

the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading." Fed. R. Civ. P. 15(c)(2). The one year statutory bar can therefore be avoided.

The Third Circuit has said that application of a provision of the AEDPA "so as to eviscerate completely the right of prisoners . . . to petition for habeas corpus relief would be 'entirely unfair . . . .'" United States v. Urrutia, C.A. No. 97-7051, Memo. Op. at 4-5 (3d Cir. Sep. 15, 1997) (quoting Reyes v. Keane, 90 F.3d 676, 679 (2d Cir. 1996)).[12] The Court concludes, however, that the risk of this "unfair" result can be avoided by dismissing the petition without prejudice to petitioner's right to file an amended petition pursuant to Federal Rule of Civil Procedure 15(c)(2) upon exhausting his state remedies. See Williams v. Vaughn, 1998 WL 217532 (E.D.Pa. Feb. 24, 1998) (DuBois, J.) (concluding that dismissal without prejudice to the right to file an amended complaint is preferable to staying federal proceedings under Rose v. Lundy and its progeny). Accordingly, the Court will dismiss the Petition for Writ of Habeas Corpus without prejudice to petitioner's right to file an amended petition pursuant to Federal Rule of Civil Procedure 15(c)(2).

V. CONCLUSION

For the foregoing reasons, the Court declines to adopt the Report and Recommendation of Magistrate Judge Smith in which it was recommended that the Petition for Habeas Corpus be denied without an evidentiary hearing. Rather, since petitioner presents this Court with a Petition for Writ of Habeas Corpus which contains four unexhausted and several exhausted claims - a "mixed" petition - the Court will dismiss the Petition without prejudice to petitioner's right to

[12] The Urrutia opinion is "not for publication", but the Court may nonetheless look to it for guidance.

file an amended petition pursuant to Federal Rule of Civil Procedure 15(c)(2) upon exhaustion of state remedies.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
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EDWARD C. PETERSON : CIVIL ACTION

vs. :

EDWARD BRENNAN, Mr.; WARDEN; : NO. 97-3477
and, THE DISTRICT ATTORNEY OF
THE COUNTY OF PHILADELPHIA; :
and, THE ATTORNEY GENERAL OF
THE STATE OF PENNSYLVANIA :

ORDER

AND NOW, to wit, on this 11th day of August 1998, upon consideration of the Petition for Writ of Habeas Corpus filed by Edward C. Peterson pursuant to 28 U.S.C. § 2254 (Document No. 1, filed May 19, 1997), the Answer of the Commonwealth of Pennsylvania to Petitioner's Petition for Writ of Habeas Corpus (Document No. 15, filed Feb. 11, 1998), the Report and Recommendation of the Honorable Charles B. Smith (Document No. 21, filed March 30, 1998), Petitioner's Objections to the Magistrate Judge's Report and Recommendation (Document No. 22, filed April 24, 1998), the Response of the Commonwealth of Pennsylvania to the Petitioner's Objections to the Magistrate Judge's Report and Recommendation (Document No. 25, filed May 8, 1998), Petitioner's Motion to Strike Certain Portions of the State's Response to Petitioner's Objections to the Magistrate Judge's Report and Recommendation, (Document No. 26, filed May 11, 1998), Petitioner's Reply to the State's Response to the Petitioner's Objections to the Magistrate Judge's Report and Recommendation (Document No. 28, filed May 18, 1998), and Commonwealth of Pennsylvania's Reply to Petitioner's Motion to Strike Certain Portions of the State's Response to the Petitioner's Objections to the Magistrate Judge's Report and

Recommendation (Document No. 29, filed June 1, 1998), for the reasons set forth in the attached Memorandum, **IT IS ORDERED** as follows:

1. The Petition for Writ of Habeas Corpus is **DISMISSED WITHOUT PREJUDICE** to petitioner's right to file an amended petition pursuant to Federal Rule of Civil Procedure 15(c)(2) upon exhaustion of his state remedies under Pennsylvania's Post Conviction Relief Act, 42 P.S. §9541 et. seq.; and

2. The Petitioner's Objections to the Magistrate Judge's Report and Recommendation are **DENIED**; and

3. The Petitioner's Motion to Strike Certain Portions of the State's Response to the Petitioner's Objections to the Magistrate Judge's Report and Recommendation is **DENIED AS MOOT** because of the dismissal of the Petition for Writ of Habeas Corpus for failure to exhaust state remedies and the denial of the Objections.[13]

BY THE COURT:

[13] In Morris v. Horn, a similar case decided by the Court on March 18, 1998, in which a certificate of appealability was issued, the Third Circuit dismissed the Commonwealth's appeal for lack of standing. Accordingly, the Court will not issue a certificate of appealability in this case.

JAN E. DUBOIS